

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY, SS.

SUPERIOR COURT

The State of New Hampshire

v.

David James

Docket No. 01-S-279-F

ORDER ON DEFENDANT'S MOTION TO DISMISS

The defendant moves to dismiss an indictment for Aggravated Felonious Sexual Assault returned on April 19, 2001, claiming prosecutorial vindictiveness. The State objects. For the reasons stated in this order, the defendant's Motion to Dismiss the indictment alleging Aggravated Felonious Sexual Assault is DENIED.<sup>1</sup> On October 1, 1998, the defendant was charged with one count of Felonious Sexual Assault pursuant to RSA 632-A:3, IV and one count of Kidnapping in connection with the same incident. After a complicated procedural history not relevant here and after at least seven rescheduled trial dates, the parties were prepared to try the case on April 3, 2001. On the morning of the first day of trial, counsel for the State informed the court and defense counsel of a defect in the indictment he had noticed for the first

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<sup>1</sup> At the final pretrial held in this case, the court indicated it would grant the defendant's motion and that a written order would follow. After further research, the court has concluded that its original decision was in error.

time when preparing for trial the night before. Specifically, the indictment failed to allege that the defendant was not the legal spouse of the alleged victim.

During a recorded bench conference, the State suggested the defendant waive the defect in the indictment since the issue was not in dispute. The State also indicated that were it to reindict, it would charge the defendant with Aggravated Felonious Sexual Assault in light of the Supreme Court's decision in State v. Dixon, \_\_\_ N.H. \_\_\_ (1999), making over-the-clothes touching a class A felony. The defendant objected to the State's request for a continuance to reindict, claiming that re-indictment for a more serious offense, after the defendant's refusal to waive the defect in the present indictment, would constitute prosecutorial vindictiveness.

After considering the parties' arguments, the court granted the State's request to continue both the Kidnapping and Felonious Sexual Assault cases to allow the State time to cure the defect in the assault indictment. In addition, the court denied the defendant's request to proceed with the Kidnapping charge only. Finally, the court indicated that it would consider the issue of prosecutorial vindictiveness in the event the State elected to charge the defendant with Aggravated Felonious Sexual Assault.

In support of his claim of prosecutorial vindictiveness, the defendant relies on State v. Marti, \_\_\_ N.H. \_\_\_, (1999). In Marti the Supreme Court found that the prosecutor's decision to

seek additional charges after the defendant successfully attacked his conviction on appeal constituted prosecutorial vindictiveness.

In this case, however, the decision to charge the defendant with a more serious crime occurred before trial. The United States Supreme Court has recognized a distinction between prosecutorial decisions to increase charges pretrial and those made after a defendant successfully challenges his conviction on appeal. That is because, "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." United States v. Goodwin, 457 U.S. 378, 381 (1982).

In Goodwin, the prosecutor decided pretrial to increase the charges after the defendant withdrew his intent to plead guilty and exercised his right to a jury trial. In reversing the lower court's finding of prosecutorial vindictiveness, the Supreme Court stated:

[T]he timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted. A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. . . . [T]he initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

Id. at 381, 382 (footnotes omitted).

In this case, the defendant was originally charged with Felonious Sexual Assault for touching the alleged victim over the clothing. At the time, the State could not legally charge him

with Aggravated Felonious Sexual Assault. Approximately one year after the original charges were brought, the Supreme Court ruled in Dixon that over-the-clothes touching of the alleged victim's genitals constitutes Aggravated Felonious Sexual Assault. Though the State could have re-indicted the defendant for a more serious crime after Dixon, it chose not to do so because a re-indictment "would have resulted in a new scheduling order . . . [a]nd because I wasn't seeking State Prison for this defendant anyway." See Transcript of Hearing, April 3, 2001, pg. 9.

Once it discovered that an element was missing from the original indictment, however, the State was required to re-indict the defendant in order to cure the defect. Rather than punishing the defendant for refusing to waive the defect, the State merely informed the court that it intended to properly indict the defendant consistent with the current state of the law. Indeed, it is difficult to imagine that, in light of Dixon any prosecutor would charge a defendant under the circumstances presented here, with anything but Aggravated Felonious Sexual Assault.

It is precisely this type of pretrial decision-making that the Court in Goodwin concluded should not constitute presumptive vindictiveness. That is because due process is designed to protect "not . . . the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather . . . the danger that the State might be retaliating against the accused for lawfully attacking his conviction." Id. at 378 (quotations

omitted).

Accordingly, the defendant's Motion to Dismiss the Aggravated Felonious Sexual Assault charge is denied. The court regrets any scheduling inconveniences the change in its decision has caused.

The clerk shall schedule the cases for trial as soon as the calendar permits.

SO ORDERED.

Date: June 5, 2001

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Tina L. Nadeau  
Presiding Justice